

STATE OF MICHIGAN  
IN THE SUPREME COURT

CHRISTOPHER D. BENTFIELD,

Plaintiff/Appellee,

vs.

BRANDON'S LANDING BOAT BAR and  
DAVID WATTS, INC., a Michigan  
Corporation,

Defendants/Appellants.

Case No. 127515

MI Court of Appeals  
Case No. 248795

Oakland Co. Circuit Court  
No. 02-039613 NO  
HON. COLLEEN A. O'BRIEN

DAVID LAWRENCE RAVID (P33384)  
JOSEPH M. PASCUZZI (P39320)  
Attorneys for Plaintiff/Appellee  
23855 Northwestern Highway  
Southfield, MI 48075  
(248) 948-9696

RICHARD F. CARRON (P52854)  
Atty for Defendant/Appellants  
28819 Franklin Road #100  
Southfield, MI 48034  
(248) 204-4649

PLAINTIFF/APPELLEE'S BRIEF OPPOSING DEFENDANTS/APPELLANTS'

APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

127515

**FILED**  
DEC 16 2004  
CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

## TABLE OF CONTENTS

TABLE OF CONTENTS.....	I
INDEX OF AUTHORITIES.....	ii
I. INTRODUCTION.....	1
II. STATEMENT OF ORDER BEING APPEALED AND RELIEF SOUGHT.....	2
III. STATEMENT OF QUESTIONS PRESENTED.....	3
IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS.....	4
1. Statement of Material Facts.....	4
2. Statement of Material Proceedings.....	4
3. Jurisdictional Statement.....	5
V. ARGUMENT IN SUPPORT OF DENYING LEAVE TO APPEAL.....	5
A. STANDARD OF REVIEW.....	5
B. STATEMENT IN OPPOSITION OF GRANTING LEAVE TO APPEAL.....	6
1. The Appellate Court's decision does not involve a legal principle of major significance to the state's jurisprudence.....	6
2. The Appellate Court's decision in this case is in line with Michigan case law.....	7
3. The Appellate Court's decision in this case is correct and does not cause material injustice.....	11
4. No new Supreme Court opinion is needed for guidance in this matter.....	12
VI. CONCLUSION.....	14
VII. RELIEF REQUESTED.....	15

## TABLE OF AUTHORITIES

### **CASE LAW**

<u>Anderson v ARK Enterprises</u> , unpublished opinion per curiam of the Court of Appeals decided [June 13, 1997] (Docket No. 188290).....	8
<u>Bentfield v Brandon's Landing Boat Bar</u> , unpublished opinion per curiam of the Court of Appeals decided [August 31, 2004] (Docket No. 248795).....	5, 10
<u>Churchman v Rickerson</u> , 240 Mich App 223; 611 NW2d 333 (2000).....	6
<u>Crawford v Palomar</u> , 7 Mich App 21; 151 NW2d 236 (1967).....	9
<u>Hernandez v Taylor Commons Ltd Partnership</u> , unpublished opinion per curiam of the Court of Appeals decided [June 29, 2004] (Docket No. 247576).....	11
<u>Jones v Enertel, Inc.</u> , 467 Mich 266, 170; 650 NW2d 334 (2002).....	6
<u>Major v Schmidt Trucking Co.</u> , 15 Mich App 75; 166 NW2d 517 (1968).....	9
<u>O'Donnell v Garasic</u> , 259 Mich App 569; 676 NW2d 213 (2004).....	7-8, 11, 12
<u>Purcell v Johnson</u> , unpublished opinion per curiam of the Court of Appeals, decided [July 11, 1997] (Docket No. 190516).....	9
<u>Woodbury v Bruckner</u> , 467 Mich 922; 658 NW2d 42 (2002).....	6, 8, 11

### **STATUTORY LAW**

MCR 7.302(B).....	6
MCL 554.139.....	1-5, 7-8, 10-13

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

CHRISTOPHER D. BENTFIELD,

Plaintiff/Appellee,  
vs.

Case No. 127515

BRANDON'S LANDING BOAT BAR and  
DAVID WATTS, INC., a Michigan  
Corporation,

MI Court of Appeals  
Case No. 248795

Defendants/Appellants.

Oakland Co. Circuit Court  
No. 02-039613 NO  
HON. COLLEEN A. O'BRIEN

DAVID LAWRENCE RAVID (P33384)  
JOSEPH M. PASCUZZI (P39320)  
Attorneys for Plaintiff/Appellee  
23855 Northwestern Highway  
Southfield, MI 48075  
(248) 948-9696

RICHARD F. CARRON (P52854)  
Atty for Defendant/Appellants  
28819 Franklin Road #100  
Southfield, MI 48034  
(248) 204-4649

**PLAINTIFF/APPELLANT'S BRIEF IN OPPOSITION**

**TO APPEAL FROM JUDGMENT**

**I. INTRODUCTION**

Plaintiff/Appellee filed his Complaint on April 1, 2002 in the Oakland County Circuit Court, alleging premises liability and specifically stating his status as a tenant of Defendants/Appellants. Defendants/Appellants filed a Motion for Summary Disposition on December 17, 2002, to which Plaintiff/Appellee responded. The trial court granted Defendants/Appellants' Motion for Summary Disposition on the grounds that the condition alleged to have caused Plaintiff/Appellee's damages was open and obvious.

Plaintiff/Appellee then filed a Motion for Reconsideration, arguing that the Summary Disposition should have been denied because he was owed a duty under MCL 554.139 to have his leased premises maintained under reasonable repair.

The trial court denied Plaintiff/Appellee's Motion for Reconsideration, ruling that it "merely presents the same issues as ruled upon previously" (Exhibit 3).

Plaintiff/Appellee appealed the grant of Summary Disposition and denial of his Motion for Reconsideration to the Michigan Court of Appeals. The Court of Appeals found that the trial court committed palpable error by granting Summary Disposition on Plaintiff's claim based upon the Open and Obvious doctrine, without taking into account Defendants/Appellants' statutory duties under MCL §554.139. Defendants/Appellants filed a Motion for Reconsideration with the Court of Appeals, which was denied.

Defendants/Appellants have now filed an Application for Leave to Appeal to this Honorable Court. Plaintiff/Appellee requests that this Application be denied, as it does not meet any of the criteria to allow the Supreme Court to grant Leave to Appeal.

## **II. STATEMENT OF ORDER BEING APPEALED AND RELIEF SOUGHT**

Defendants/Appellants appeal the unpublished per curiam opinion of the Court of Appeals, released August 31, 2004, reversing the order of the Oakland County Circuit Court, entered March 26, 2003, granting Defendants/Appellants' Motion for Summary Disposition and the Order dated May 6, 2003, denying Plaintiff/Appellee's Motion for Reconsideration.

In that unpublished per curiam opinion, the Court of Appeals ruled that the trial court committed "palpable error" when it granted Summary Disposition on Plaintiff's premises liability claim, based upon the Open and Obvious doctrine, without taking into account Defendants/Appellants' statutory duties under MCL §554.139, wherein Plaintiff based his claim upon allegations contained in his Complaint that he was on Defendants/Appellants' premises as a "tenant".

The Court of Appeals found that the trial court abused its discretion in denying Plaintiff's Motion for Reconsideration, basing said denial solely upon the fact that Plaintiff's Motion for Reconsideration raised issues that were "ruled upon previously by this Court, either expressly or by reasonable implication".

Plaintiff/Appellee urges this Honorable Court to deny Leave to Appeal.

### **III. STATEMENT OF QUESTION PRESENTED**

WHETHER THE TRIAL COURT COMMITTED PALPABLE ERROR IN GRANTING SUMMARY DISPOSITION ON PLAINTIFF/APPELLEE'S CLAIM WITHOUT TAKING INTO ACCOUNT DEFENDANTS/APPELLANTS' STATUTORY DUTIES UNDER MCL 554.139?

Plaintiff/Appellee answers "Yes."

Defendants/Appellants answer "No."

Trial Court would answer "No."

Court of Appeals answered "Yes."

#### IV. STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

##### **1. Statement of Material Facts**

Plaintiff/Appellee filed his Complaint alleging premises liability and specifically stating his status as a tenant of Defendants/Appellants. In fact, Defendants/Appellants have never disputed or contested Plaintiff/Appellee's status as a tenant.

It is also uncontested that Plaintiff/Appellee suffered personal injuries while on Defendants/Appellants' premises as a "tenant", and alleged that those injuries were caused by Defendants/Appellants' failure to maintain the premises in reasonable repair and in compliance with the State and local safety laws, as provided for under MCL §554.139.

##### **2. Statement of Material Proceedings**

For his Complaint, Plaintiff/Appellee specifically alleged his status as a tenant of Defendants/Appellants (Exhibit 1). During the course of discovery, Defendants/Appellants never contested Plaintiff/Appellant's status as their tenant, and in fact admit such. Defendants/Appellants filed a Motion for Summary Disposition, based upon the Open and Obvious doctrine, which Motion was granted by the Trial Court.

Plaintiff/Appellee filed a Motion for Reconsideration, arguing that the trial court committed palpable error in granting Summary Disposition, based upon the Open and Obvious doctrine, without taking into account the statutory duties owed by Defendants/Appellants under MCL §554.139.

The trial court denied Plaintiff/Appellant's Motion for Reconsideration, specifically stating that it "merely presents the same issues ruled upon previously".

**3. Statement of Jurisdiction**

Plaintiff/Appellee does not dispute this Honorable Court's jurisdiction to consider leave to appeal the decision of the Michigan Court of Appeals.

**V. ARGUMENT IN SUPPORT OF DENYING LEAVE TO APPEAL**

**A. Standard of Review**

The Michigan Court of Appeals reversed the trial court's denial of Plaintiff/Appellant's Motion for Reconsideration, finding an abuse of discretion. In denying that Motion for Reconsideration, the trial court ruled that Plaintiff/Appellant presented the same issues as ruled upon previously in the dismissal of Plaintiff/Appellant's Complaint and granting of Summary Disposition.

The Court of Appeals reversed that grant of Summary Disposition, ruling that the trial court did not, in fact, address the elements of MCL §554.139 and, if it did, it errantly granted Summary Disposition in favor of Defendants/Appellants, based upon application of the Open and Obvious Danger doctrine. The Court of Appeals specifically held that the trial court abused its discretion in denying Plaintiff/Appellee's Motion for Reconsideration.

Rulings on Motions for Reconsideration are reviewed for "abuse of discretion". Churchman v Rickerson, 240 Mich App 223; 611 NW2d 333 (2000).

**B. Statement in Opposition to Granting Leave of Appeal**

Under MCR 7.302(B), for leave of appeal to be granted, the Appellant must demonstrate that the issues presented in this case involve a substantial question as to the validity of a legislative act, that the issue has significant public interest; that the issue involves legal principles of major significance to the state's jurisprudence, or that the Court of Appeals' decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals.

Defendant/Appellant's Application for Leave to Appeal meets none of the criteria set forth in the rule and therefore, Leave to Appeal should be denied.

**1. The Appellate Court's decision does not involve a legal principle of major significance to the state's jurisprudence.**

The Appellate Court's decision was correctly based upon the principle of law that the common law doctrine of Open and Obvious cannot be used to avoid a specific statutory duty. Woodbury v Bruckner, 467 Mich 922; 658 NW2d 42 (2002); O'Donnell v Garasic, 259 Mich App 569, 581-582; 676 NW2d 213 (2004); Jones v Enertel, Inc., 467 Mich 266, 170; 650 NW2d 334 (2002).

The Court of Appeals, in its decision, notes that Plaintiff/Appellee brought a Motion for Reconsideration before the trial court after the granting of Summary Disposition in favor of Defendants/Appellants, urging that the trial court reconsider its decision based upon Plaintiff/Appellee's status as a tenant on Defendants/Appellants' premises at the time of his injury, and the statutory duties provided in MCL §554.139(1)(a) and (b). The trial court denied Plaintiff/Appellee's Motion for Reconsideration, stating that the issues raised were "ruled upon previously by this Court, either expressly or by reasonable implication".

In fact, as noted by the Court of Appeals, the trial court did not address, either expressly or by reasonable implication, the elements of MCL §554.139. Accordingly, the Court of Appeals correctly ruled that the trial court abused its discretion in denying Plaintiff's Motion for Reconsideration.

These rulings are consistent with established precedent and not significant to the State's jurisprudence.

**2. The Appellate Court's decision in this case is in line with Michigan case law.**

The decision of the Court of Appeals that the Open and Obvious Doctrine cannot be used to avoid specific statutory duties is well-supported by Michigan case law. In fact, after rendering the unpublished per curiam opinion as noted below, the Court of Appeals published the decision of O'Donnell, supra, providing that:

"The Open and Obvious Danger doctrine is not available to deny liability to an injured invitee or licensee on leased or licensed residential premises when such premises present a material breach of the specific statutory duty imposed on owners of residential properties to maintain their premises in reasonable repair and in accordance with the health and safety laws, as provided in MCL 554.139(1)(a) and (b). O'Donnell, supra at 518.

This Honorable Court established the rule of law that the Open and Obvious doctrine cannot be used to avoid specific statutory duties in Jones, supra. This Court then expanded that rule to specifically include MCL §554.139 in Woodbury, supra.

When the trial court was presented with this rule of law and asked to apply it to the facts of this case, wherein a tenant/invitee was injured on leased residential premises, the trial court failed to do so. The Court of Appeals correctly ruled that it was palpable error to deny Plaintiff/Appellee's Motion for Reconsideration without taking into account Defendants/Appellants' statutory duties under MCL §554.139.

A more recent case also concerning statutory pleading comes to the same conclusion. Anderson v ARK Enterprises, unpublished decision per curiam of the Court of Appeals, decided [June 13, 1997] (Docket No. 188290) (Exhibit 5). Plaintiff and her son rented an apartment from defendant and began experiencing severe illnesses soon after moving in. Id. at \*1-2. Plaintiff believed that environmental conditions in her apartment were making her and her son ill, and notified the defendant to that effect. Id. at \*2.

She later had the apartment independently tested and unhealthy

levels of arsenic were found in the apartment. Id. Plaintiff filed a Complaint, specifically alleging negligence and other causes of action. Id. at \*3. The plaintiff failed to specifically plead applicable statutory violations. Id. at 8. Again, the Court of Appeals held that, despite the failure to plead the specific statutes, plaintiff's complaint contained "specific allegations reasonably necessary to inform the adverse party of the nature of the claims the adverse party is called on to defend." Id. at 9. See also, Major v Schmidt Trucking Co., 15 Mich App 75, 166 NW2d 517 (1968) (holding that a complaint need only state enough to reasonably inform the defendant of the nature of the case); Purcell v Johnson, unpublished decision per curiam of the Court of Appeals decided [July 11, 1997] (Docket No. 188673) (Exhibit 6) (holding that the failure to specifically plead a statute is not fatal to the cause of action).

Moreover, a statute does not have to be specifically pled to set forth a cause of action. Crawford v Palomar, 7 Mich App 21, 26; 151 NW2d 236 (1967). In Crawford, plaintiff was injured at the home of friends when a porch banister gave way, and she fell 4 to 5 feet. An older version of the statutory warranty of habitability applied in the case. The plaintiff's complaint alleged a violation of that duty, and specifically stated that the banister was "improperly maintained." The Court of Appeals held that, although plaintiff did not specifically plead the statute, that failure was not fatal to plaintiff's cause of action as he set forth sufficient facts to show a claim based thereon. Id. at 26 fn 2.

Defendant/Appellant argues that Plaintiff raised a new issue or cause of action in his Motion for Reconsideration by arguing the violation of MCL 554.139. That argument is plainly incorrect. The trial court denied Plaintiff's Motion for Reconsideration on the grounds that it raised no new issue either expressly or by implication (Exhibit 3, Order of Trial Court dated May 6, 2003). By doing so, the trial court ruled Plaintiff had raised the violation of the statutory warranty of habitability in his Motion for Summary Disposition. The Appellate Court was correct in holding that the trial court improperly disposed of the issue on summary disposition.

The decision of the Appellate Court was correct in noting that Plaintiff based his claims on the fact that he was a "tenant." See Bentfield v Brandon's Landing Boat Bar, unpublished opinion per curiam of the Court of Appeals decided [August 31, 2004] (Docket No. 248795), \*5 fn 2 (Exhibit 4). The Court of Appeals also noted in its opinion that the trial court did not base its denial on the fact that Plaintiff had not pled this claim. (Exhibit 4, p. \*6, fn 3). By bringing his claim as a tenant, Plaintiff raised his claim under the warranty of habitability and gave Defendant/Appellant enough relevant facts to put him on notice of the claim.

Also, Hernandez v Taylor Commons Ltd. (Defendant/Appellant's Exhibit F), cited by Defendant/Appellant, is not dispositive in the case. In Hernandez, plaintiff, in his Motion for Reconsideration, alleged violations of the BOCA code regarding maintenance of parking lots, but did not make clear how they applied to the City of Taylor. Furthermore, he did not allege or state any facts that would indicate he was entitled to the protection of the statute until his Motion for Reconsideration. Here, Plaintiff always alleged he was a tenant of Defendant, and the decisions of the trial court and Court of Appeals make clear that Plaintiff had pled sufficiently to raise the issue of MCL 554.139.

**3. The Appellate Court's decision in this case is correct and does not cause material injustice.**

It is not in dispute that Plaintiff/Appellee was a tenant of Defendants/Appellants. For his Complaint, Plaintiff/Appellee specifically alleged that he was injured because Defendants/Appellants failed to properly maintain its leased premises, consistent with its duties imposed by Michigan statutory and common law.

The Court of Appeals decision correctly noted that MCL §554.139 imposes a statutory obligation upon lessors of residential premises, and that the Open and Obvious doctrine cannot be used to avoid a specific statutory duty. Woodbury v Bruckner, 467 Mich 922; 658 NW2d 482 (2002); O'Donnell v Garasic, 259 Mich App 569; 676 NW2d 213 (2004).

The Court of Appeals correctly ruled that, based upon recent case law and the allegations in Plaintiff's Complaint setting forth his status as a tenant of Defendants/Appellants, it was "palpable error" for Summary Disposition to be granted upon Plaintiff's claim, based upon the Open and Obvious doctrine, without taking into account Defendants/Appellants statutory duties under MCL §554.139. The Court of Appeals correctly noted that, in denying Plaintiff's Motion for Reconsideration, the trial court held that the issue with regard to the application of the Open and Obvious doctrine to the statutory duties imposed by MCL §554.139 was ruled upon previously by the trial court.

**4. No new Supreme Court opinion is needed for guidance in this matter.**

The Court of Appeals correctly followed a well-established precedent when it ruled that MCL §554.139 imposes a statutory obligation upon lessors of residential premises, and that the Open and Obvious doctrine cannot be used to avoid such specific statutory duties. This Honorable Court had the opportunity to clarify this well-established rule of law, and declined to do so when it denied leave to appeal in the matter of O'Donnell v Garasic, 470 Mich 886; 682 NW2d 90 (2004).

The Court of Appeals specifically noted that the trial court denied Plaintiff/Appellee's Motion for Reconsideration, stating that it "merely presents the same issues as ruled upon previously by this Court, either expressly or by reasonable implication". The Court of Appeals ruled that it was "palpable error" to grant Summary Disposition based upon the Open and Obvious doctrine without taking into account Defendants/Appellants' statutory duties under MCL §554.139. Therefore, the trial court abused its discretion in denying Plaintiff/Appellee's Motion for Reconsideration, and erroneously granting Summary Disposition.

Importantly, the Court of Appeals noted that the trial court did not base the denial of Plaintiff's Motion for Reconsideration on the fact that Plaintiff/Appellee's statutory claim was not made prior to the trial court's original order. That fact, coupled with the recent history of case law applying the statutory exception to the Open and Obvious doctrine in MCL §554.139, caused the Court of Appeals to recognize that an abuse of discretion in denying Plaintiff/Appellee's Motion for Reconsideration existed.

Certainly, there is no need for a Supreme Court opinion to provide guidance in this matter, as the Court of Appeals has ruled correctly in this matter.

## VI. CONCLUSION

Plaintiff/Appellee pled sufficient facts to put Defendants/Appellants on notice that this premises liability claim was brought by a tenant. Michigan case law clearly provides that failure to specifically cite in the complaint a specific statute is not fatal to the cause of action. Defendants/Appellants' Application for Leave to Appeal meets none of the criteria needed for the Michigan Supreme Court to grant Leave. This case simply does not involve legal principles of major significance to the State's jurisprudence, and the underlying appellate decision is in line with Michigan precedent.

A material injustice would not be placed upon Defendants/Appellants by allowing this case to be decided upon its merits. Michigan practitioners are not in need of clarification on this issue. The granting of Leave to Appeal is an extraordinary act, which the Michigan Supreme Court should provide only under extraordinary circumstances. This case simply does not present those circumstances.

**VII. RELIEF REQUESTED**

For the reasons set forth in this Opposition to Appeal from Judgment, Plaintiff/Appellee CHRISTOPHER D. BENTFIELD respectfully requests that this Honorable Court deny leave to appeal in this case and allow the decision of the Court of Appeals to stand.

Respectfully submitted,

RAVID & ASSOCIATES, P.C.

BY: 

JOSEPH M. PASCUZZI (P39320)  
Atty for Plaintiff/Appellee  
23855 Northwestern Highway  
Southfield, MI 48075  
(248) 948-9696

Dated: December 15, 2004

E:\DATA\FILES\B\BENTFIEL\SUPCT\BRIEF.OPP.wpd